Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MAISLIN TRANSPORT OF DELAWARE
and MAISLIN TRANSPORT LIMITED,

Petitioners,

—against—

FARRELL LINES INCORPORATED, as successor
by merger to AMERICAN EXPORT LINES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is an inland common carrier bound by the Carmack Amendment, 49 U.S.C. § 20 (11) which requires that any limitation on the value of the cargo to be transported be in writing?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Gordon H. Mooney, Ltd., co-respondent respectfully requests that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, dated February 22, 1980, holding that the petitioners' limitation of liability defense was ineffective because the petitioners had not complied with the statutory requisite prescribed by the Carmack Amendment. (49 U.S.C. § 20(11)).

STATEMENT OF THE CASE

The case arose out of damage to a shipment of frozen dover sole. Plaintiff below and co-respondent herein, Gordon H. Mooney Ltd. (hereinafter referred to as Mooney) had contracted to purchase 36,000 pounds of dover sole. (A482)* American Export Lines, Inc. later merged into Farrell Lines, Incorporated, respondent herein, (hereinafter referred to as "Farrell") agreed to carry the cargo from Amsterdam to Toronto, pursuant to the terms of its ocean bill of lading, which included transshipment (A553). The 1400 cartons of frozen fish were placed in a sealed forty-foot refrigerated container known as a "reefer" in good order and condition (A553). Mooney paid for the dover sole and received all documents of title on or about September 28, 1976, after the goods had been delivered at Toronto, Canada (A553). When the goods arrived in New York, (A501) Farrell arranged with Maislin Transport of Delaware and Maislin Transport Ltd., the petitioners (hereinafter collectively referred to as "Maislin"), an inland motor common carrier, to transship the reefer containing the 1400 cartons of frozen dover sole, to Farrell's agent, Seabridge International Shipping Ltd. (hereinafter referred to as "Seabridge"), at a certain address in Ontario, Canada. The shipment was evidenced by an inland bill of lading (48a)** This bill of lading, issued by Maislin, stated as follows:

> "Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby stated by the shipper to be not exceeding _____ per $_____."

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* Figures in parentheses preceded by "A" refers to pages in the joint appendix in the Court of Appeals for the Second Circuit.

** Figures in parentheses followed by "a" refer to pages in the appendix to petitioners petition.

The blank spaces in the quoted portion of the bill of lading set forth above were not filled in by either Maislin or Farrell. Moreover, there was no other writing evidencing the agreed upon value of the goods. The petitioner then transshipped the instant container to Canada. The fish decomposed after its arrival in Canada due in part to improper handling by Maislin.

This lawsuit followed. Although Mooney named Terfloth and Kennedy B.V., the sellers and Seabridge, along with Farrell Lines and Maislin, the case developed into a dispute between Mooney and the latter two defendants, Farrell and Maislin. Maislin and Farrell cross-claimed against each other and Maislin interposed a defense of limitation of liability. The case was referred to Magistrate Martin Jacobs of the United States District Court for the Southern District of New York. Magistrate Jacobs held that Mooney was entitled to a full recovery, that Farrell was liable in full for its negligence and that Farrell was not entitled either to indemnity against Maislin, petitioners herein, or to any apportionment of damages. (13a-15a) District Judge MacMahon confirmed the Magistrate's findings and adopted his conclusions. (16a-19a) Farrell thereupon appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals, in modifying the judgment of the District Court, held that both Maislin and Farrell were equally guilty of negligence in the handling of the shipment. (32a-34a) The Court of Appeals went on to hold that since neither the freight rate nor the valuation of the shipment was written on the instant bill of lading, Maislin had not complied with the language of the Carmack Amendment and that, accordingly, it was not entitled to a limitation of liability (34a-35a). Maislin then moved to reargue, which motion was summarily denied by the Court of Appeals. (41a-42a)

It is asserted in the petition for a writ of certiorari that the Court of Appeals improperly denied Maislin's claim of limitation of liability and that the petition should be granted because there is a conflict between its decision and prior decisions. However the decision of the Court of Appeals is in

accordance with the law and to hold otherwise would obviate the purpose of the Carmack Amendment 49 U.S.C. Section 20 (11) (43a-46a) (current version at 49 U.S.C. Section 10730 (1978). (47a). Maislin does not bring up for hearing the issue of its negligence.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The petitioners predicate their petition for a writ of certiorari to review the Court of Appeals decision on the grounds that it is in conflict with a prior decision of this Court and with the prevailing law in other jurisdictions. The petitioners also assert that the decision will cause mischief because it is contravention of the petitioner's custom and practice. The petition should be denied, the petitioners' practice notwithstanding because the decision by the Court of Appeals that the petitioners' failure to comply with the Carmack Amendment precluded them from limiting their liabilty was correct and in accordance with both case law and the applicable statute.

The Carmack Amendment specifically requires that the agreement as to value be in writing, if the carrier is to limit his liability for its own negligence. The courts, in construing the Carmack Amendment and its predecessor, the Cummins Amendment have consistently found this requirement to be an indispensable prerequisite to an effective limitation of liability. Consequently the law as it now stands provides a simple, clear cut and sound method of limiting liability for ones own negligence and the Court of Appeals was correct in reaffirming it. This sound principle should not be changed because a party has chosen not to adhere to it and apparently gotten away with it for many years.

POINT I

THE DECISION OF THE COURT OF APPEALS THAT A VALUE MUST BE STATED IN WRITING IN ORDER FOR AN INLAND CARRIER TO LIMIT ITS LIABILITY WAS A CORRECT & CONSISTENT PRONOUNCEMENT OF THE LAW

The petitioners, by their own admission, are covered by the Carmack Amendment. This amendment imposes full liability on a carrier for goods damaged in its possession due to the carrier's negligence unless it is authorized to maintain rates dependent on value and the value is declared by the shipper in writing or the released value is agreed to in writing.

The petitioners have failed to offer one scintilla of evidence that a value was agreed upon in writing and the Court of Appeals for the Second Circuit correctly held that the petitioners had not therefore complied with the requisites necessary to limit their liability.

This holding is consistent with the Court's decision in *American Railway Express Co. v. Lindenberg,* 260 U.S. 584, 43 S. Ct. 206, 67 L. Ed. 414 (1922), as well as with decisions in the various circuits. In *American Railway Express,* this Court held that a written statement of value was necessary to satisfy the terms of the statute and if the agreement complied with the statute, its non-essential terms could be inferred from course of conduct of the parties. More specificlaly, since the agreement contained the necessary statement of value and was tendered and accepted it would bind the parties even though it had not been signed by the party accepting it. The petitioners allege in their petition that the value stated in the bill of lading and construed in *American Railway Express* was not the true value and say that this case supports their argument that no statement of value was necessary. However, there was and is no statutory requirement that the value stated had to be the true value. Rather, the statute required and continues to require only that a value must be stated. This requirement had

been compiled with by the carrier in *American Railway Express* unlike the situation in the instant case. Moreover implicit in the Court's reasoning was the fact that the carrier could fix the value, as long as the shipper assented thereto.

This reasoning was adhered to by the Ninth Circuit in *Boeing Co. v. U.S.A.C. Transport Inc.*, 539 F.2d 1228 (9th Cir. 1976). After satisfying itself that the statutory requirements had been met, the Court in *Boeing* held that the written statement of value could be tendered after the delivery of the goods, absent a statutory proscription to the contrary. It did not hold, as the petitioners assert, that the requirements of a writing could be dispensed with entirely. Moreover, even if the petitioners' assertion is correct, a subsequent Ninth Circuit case specifically held that a blank bill of lading identical to the one at bar was insufficient to limit the carrier's liability, even though it was accepted by the shipper. *Mass v. Braswell Motor Freight Lines,* 577 F.2d 665 (9th Cir. 1978). It was this Ninth Circuit case which the Court of Appeals for the Second Circuit cited with approval in rendering its decision in the instant case.

The Second Circuit also cited *Loeb v. Friedman's Express, Inc.*, 187 Misc. 89, 65 N.Y.S. 2d 450, (Sup.Ct.App. Term), aff'd 271 App. Div. 873, 66 N.Y.S. 2d 634 (1st Dept.) (*mem.*), aff'd 296 N.Y. 1029, 73 N.E. 2d 906, (1946), *cert. denied* 331 U.S. 851, 91 L. Ed. 1859 (1947).

In *Loeb* the carrier had issued a blank bill of lading identical to the one at bar. The Court held that this did not satisfy the requirement of the amendment and stated that

> In order to sustain a limitation of liability in this case we should be obliged to go beyond the earlier cases [e.g. *American Railway Express v. Lindenberg*, 260 U.S. 584 43 S. Ct. 206, 67 L.Ed 414 (1922)] and to hold that where a bill of lading in the form here used, received by the shipper and signed by him, contained a legend calling for the declared value to be stated by the shipper, which value is not inserted, that it itself is tantamount to a

> declaration in writing of the value of the shipment on the basis of the minimum tariff. *The statutory language has no such meaning*. 187 Misc. at 91, 65 N.Y.S. 2d at 451 (emphasis added).
>
> *See also Caten v. Salt City Movers & Storage Co.*, 149 F.2d, 428 (2nd Cir. 1945).

Moreover according to both the Carmack amendment and the Court's holding in *American Railway Express* the onus of stating the value does not fall exclusively on the shipper. Rather the law states only that the limitation of liability shall apply where the value is declared in writing as the released value of the property. Thus the petitioners could have specifically limited the value themselves, or as the Court said in *Thomas Electronics Inc. v. H.W. Taynton Company,* 277 F. Supp. 639 (M.D. Pa. 1967) the petitioner could have refused to accept shipments unless a value was declared. But if a carrier does accept shipments without the appropriate declaration of value, that acceptance, according to the Court in *Thomas Electronics* will not destroy the protection afforded to the shippers by the amendment. The burden therefore was upon Maislin, petitioners herein, to require that the value be set forth.

In conclusion the petitioners have cited several cases for the proposition that a written statement of value is not necessary and point to the fact that the courts have considered factors such as prior dealings, correspondence and tariffs, in addition to the bill of lading, in ascertaining whether or not there was an agreement as to value. However in actuality there was a written statement of value in every instance where the Court upheld the carrier's limitation on liability and the surrounding circumstances were examined only to flush out the agreement as regarded the non-essential elements.

The petitioners are requesting that this Court change the law requiring a written statement of value to limit liability because it conflicts with the petitioners prevailing course of business

dealing. The law is sound and to change it would frustrate the purpose of the statute and cause, to use the petitioners own terms a "great deal of mischief in this field".

Thus respondent respectfully requests that this Court deny the petition for a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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